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No. 06-1322

IN THE

Supreme Court of the United States

FEDERAL EXPRESS CORPORATION,

Petitioner,

v.

PAUL HOLOWECKI, *et al.*,

Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

LAWRENCE Z. LORBER
Counsel of Record
STEPHANIE L. MARN
MEREDITH C. BAILEY
JAMES F. SEGROVES
PROSKAUER ROSE LLP
1001 Pennsylvania Ave., NW
Suite 400 South
Washington, DC 20004
(202) 416-6800

ROBIN S. CONRAD
SHANE BRENNAN
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Counsel for Amicus Curiae

210341

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the Second Circuit erred in concluding, contrary to the law of several other circuits and implicating an issue this Court has examined but not yet decided, that an "intake questionnaire" submitted to the Equal Employment Opportunity Commission ("EEOC" or the "Commission") may suffice for the charge of discrimination that must be submitted pursuant to the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA" or the "Act"), even in the absence of evidence that the EEOC treated the form as a charge or the employee submitting the questionnaire reasonably believed it constituted a charge.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CITED AUTHORITIES	iv
INTEREST OF THE *AMICUS CURIAE*	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	3
I. THE SECOND CIRCUIT'S DECISION SHOULD BE REVERSED BECAUSE IT DEPRIVED THE EEOC OF THE OPPORTUNITY TO DISCHARGE ITS DUTIES OF NOTICE AND CONCILIATION UNDER THE STATUTORY AND REGULATORY SCHEMES, AND IS UNSUPPORTED BY EXISTING CASE LAW	3
A. The Second Circuit Abused Its Discretion By Allowing Kennedy To Bypass The ADEA's Administrative Remedies	3
B. The Second Circuit's Decision Should Be Reversed Because It Misinterprets The EEOC's Regulations And Misunderstands EEOC Procedure	11
C. The Second Circuit's Decision Should Be Reversed Because It Is Not Supported By Existing Case Law	13

Contents

Page

II. THE SECOND CIRCUIT'S FINDING THAT AN INTAKE QUESTIONNAIRE MAY ROUTINELY FUNCTION AS A CHARGE SHOULD BE REVERSED BECAUSE IT DEPRIVES EMPLOYERS OF THE BENEFIT OF THE EEOC'S VETTING PROCESS FOR DISCRIMINATION CLAIMS 16

A. Finding That An Intake Questionnaire Should Function As A Charge Forces Employers To Respond To Charges That Have Not Been Vetted By The EEOC .. 16

B. Finding That Every Intake Questionnaire Is A Charge Harms Employers Where It Increases The EEOC's Workload Such That The Agency Cannot Efficiently Process Claims Or Fulfill Its Statutory Obligations 17

III. THE SECOND CIRCUIT'S INTERPRETATION PERMITTING INTAKE QUESTIONNAIRES TO SUBSTITUTE FOR CHARGES IS INCORRECT BECAUSE IT WOULD PLACE THE EEOC IN THE POSITION OF HAVING CONFLICTING OBLIGATIONS UNDER THE PRIVACY ACT AND THE ADEA 19

CONCLUSION 20

TABLE OF CITED AUTHORITIES

Page

Cases

Alexander v. Gardner-Denver Co.
415 U.S. 36 (1973) 4

Bost v. Fed. Express Corp.,
372 F.3d 1233 (11th Cir.), *cert. denied*,
543 U.S. 1020 (2004) 13

Clark v. Coats & Clark, Inc.,
865 F.2d 166 (3d Cir. 1982) 13

Diez v. Minn. Mining & Manuf. Co.,
88 F.3d 672 (8th Cir. 1996) 12, 14

Early v. Bakers Life & Cas. Co.,
959 F.2d 75 (7th Cir. 1992) 12, 13

EEOC v. Assoc. Dry Goods Corp.,
449 U.S. 590 (1981) 6

Hodge v. N.Y. College of Podiatric Med.,
157 F.3d 164 (2d Cir. 1998) 14, 15

Holowecki v. Fed. Express Corp.,
No. 02 Civ. 3355, 2002 WL 31260266
(S.D.N.Y. Oct. 9, 2002) 8, 13

Holowecki v. Fed. Express Corp.,
440 F.3d 558 (2d Cir. 2006) 14

Cited Authorities

	Page
Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162 (2007)	9
Legnani v. Alitalia Linee Aeree Italiane, S.P.A., 274 F.3d 683 (2d Cir. 2001)	4
Levy v. U.S. Gen. Accounting Office, No. 97 Civ. 4016, 97 Civ. 4488, 1998 WL 193191 (S.D.N.Y. Apr. 22, 1998)	8
Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998)	4
Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002)	4, 9
Price v. Sw. Bell Tel. Co., 687 F.2d 74 (5th Cir. 1982)	13
Rogers v. Exxon Research & Eng'g, 550 F.2d 834 (3d Cir. 1977)	4
Steffen v. Meridian Life Ins. Co., 859 F.2d 534 (7th Cir. 1988)	12, 13

Cited Authorities

Page

Statutes

Age Discrimination & Employment Act of 1964, 29 U.S.C. § 626(d) 3, 10

29 U.S.C. § 626(e) 10

29 U.S.C. § 633(b) 10

Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(b) ... 4

Privacy Act of 1974, 5 U.S.C. § 522a 3, 19

Title I of the Americans with Disabilities Act, 42 U.S.C. § 12117(a) 10

Title VII, 42 U.S.C. § 2000e-5(f)(1) 10

Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 7, 81 Stat. 602 (1967) ... 5

Legislative Materials

113 Cong. Rec. 7076 (daily ed. Mar. 16, 1967) ... 5

S. Rep. No. 90-723 (1967) 5

Reorganization Plan No. 1 of 1978, *reprinted in* 1978 U.S.C.C.A.N. 9799 5

H.R. Rep. No. 110-240 (2007) 19

Cited Authorities

Page

Rules and Regulations

29 C.F.R. § 1611.10 19

29 C.F.R. § 1626.3 12

29 C.F.R. § 1626.11 11

29 C.F.R. § 1626.12 11

Other

EEOC: New Charge-Processing System Means More Action at Local Level, Official Says, 92 Daily Lab. Rep. (BNA) D-9 (May 12, 1995) 18

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EEOC, *Charge Statistics – ADEA*, http://www.eeoc.gov/stats/adea.html 7

EEOC, *Charge Statistics – All Statutes*, http://www.eeoc.gov/stats/all.html 7

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INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of vital concern to the nation's business community.

Many of the Chamber's members are employers subject to the ADEA, as well as other equal employment laws and regulations. As employers and potential respondents to charges of age discrimination under the ADEA, many of the Chamber's members have a significant interest in the issues raised by this case.

The Chamber seeks to assist the Court by highlighting the impact its decision in this case will have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of the Court relevant matters that have not already been brought to its attention by the parties. Because of its experience in these matters, the Chamber is well-situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers.

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[1] Pursuant to Sup. Ct. R. 37.6, *amicus curiae* state that no counsel for a party has written this brief in whole or in part, and that no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Pursuant to Sup. Ct. R. 37.3(a), written consent to the filing of this brief has been obtained from counsel for Petitioner and Respondents, and the documents confirming consent have been submitted to the Clerk's office.

SUMMARY OF THE ARGUMENT

The Second Circuit allowed Patricia Kennedy and those piggybacking on her claim (collectively "Kennedy") to proceed with litigation without having first filed an appropriate charge of discrimination with the EEOC. The Second Circuit's decision should be reversed because it misinterprets the statutory and regulatory scheme that empowers the EEOC to appropriately address claims of employment discrimination prior to litigation. Were the EEOC intended to be a mere ticket taker *en route* to federal court, the Second Circuit's approach would be adequate. However, Congress charged the EEOC with interpreting, administering, and enforcing the ADEA (and similar statutes) and to investigate and resolve instances of discrimination.

Allowing Kennedy to bypass the administrative procedures established by Congress prevents the EEOC from discharging its duties of notice and conciliation under the ADEA. If the EEOC understands the claimant's lodging of an intake questionnaire to be preliminary, it does not notify the employer of the charge, nor does it seek conciliation between the employer and the claimant. The decision below frustrates the statutory design of the ADEA, which seeks to encourage pre-litigation resolution of claims. The purpose of the statutory scheme is not to prolong claims and engage in a legal game of "gotcha," but to surface issues, identify problems, and where possible, promptly abate the offending practice.

The Second Circuit's suggestion that an intake questionnaire may routinely function as a charge creates a host of practical problems that interfere with the EEOC's ability to efficiently process claims. Such practical problems

have significant repercussions for employers, claimants, the courts and the EEOC where the agency's inability to process claims undermines its mission of eradicating employment discrimination.

Finally, because intake questionnaires are governed by the Privacy Act of 1974, 5 U.S.C. § 522a (the "Privacy Act"), the EEOC cannot disclose the information contained within the questionnaire without the claimant's written consent. The Second Circuit's decision thus complicates the EEOC's ability to comply with its statutory obligation to provide notice to employers without violating the provisions of the Privacy Act.

ARGUMENT

I. THE SECOND CIRCUIT'S DECISION SHOULD BE REVERSED BECAUSE IT DEPRIVED THE EEOC OF THE OPPORTUNITY TO DISCHARGE ITS DUTIES OF NOTICE AND CONCILIATION UNDER THE STATUTORY AND REGULATORY SCHEMES, AND IS UNSUPPORTED BY EXISTING CASE LAW

A. The Second Circuit Abused Its Discretion By Allowing Kennedy To Bypass The ADEA's Administrative Remedies

Section 7(d) of the ADEA, 29 U.S.C. § 626(d), provides that "[n]o civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the [EEOC]." Upon "receiving such a charge," the Commission "*shall promptly notify* all persons named in such charge as prospective defendants . . . and *shall promptly seek* to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion." *Id.* (emphasis added).

Congress's use of "shall" in the statute makes the EEOC's duties of notice and conciliation mandatory and impervious to judicial discretion. *See, e.g., Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109 (2002) (citing *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998)). Despite the fact that the express statutory requirements had not been met by the plaintiffs below, the Second Circuit's decision found that it could retain jurisdiction of the action under the ADEA. As such, the Second Circuit abused its discretion by allowing Kennedy to circumvent the ADEA's administrative remedies without evidence that the EEOC had initiated its statutory duties.

"Exhaustion of administrative remedies through the EEOC is an essential element of the Title VII [of the Civil Rights Act of 1964] and ADEA statutory schemes and, as such, a precondition to bringing such claims in federal court." *Legnani v. Alitalia Linee Aeree Italiane, S.P.A.*, 274 F.3d 683, 686 (2d Cir. 2001) (internal quotations omitted). The exhaustion of administrative remedies provides the EEOC with the opportunity to notify employers that a grievance has been filed and conciliate claims prior to an aggrieved party filing a lawsuit. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1973).[2]

The Second Circuit's approach deprived the EEOC of an opportunity to carry out either of its essential functions under the ADEA, and denied the employer the opportunity to investigate and resolve any issue prior to the commencement of litigation. First, the Second Circuit deprived the EEOC any meaningful opportunity to mediate employment grievances by allowing plaintiffs to proceed directly to litigation. This not only

[2] The ADEA's enforcement provisions mirror those of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(b), and reflect Congress's clear preference for administrative remedies over private lawsuits. *Rogers v. Exxon Research & Eng'g*, 550 F.2d 834, 841 (3d Cir. 1977).

undermines the EEOC's role as mediator and conciliator as intended by Congress, but it robs the parties of the chance to settle claims prior to initiating costly and time-consuming litigation.

The legislative history behind the ADEA is replete with references to the importance of the process of conciliation. For example, Senator Javits stated that the method of enforcement of the ADEA "is direct action in the District Court by the Secretary of Labor[3] or the employee for appropriate relief. Such action may only be commenced after informal methods of conciliation have been exhausted." 113 Cong. Rec. 7076 (daily ed. Mar. 16, 1967). The Senate Report stated:

> A condition precedent to the bringing of an action by an individual is that he must give the Secretary 60 days notice of his intention to do so. This is to allow time for the Secretary to mediate the grievance. It is intended that the responsibility for enforcement vested in the Secretary by Section 7 be initially directed through information methods of conciliation and that formal methods be applied only if voluntary compliance cannot be achieved.

S. Rep. No. 90-723, at 5 (1967). Consequently, the ADEA provides that an individual cannot initiate a civil action until

[3] Originally the Department of Labor maintained enforcement and regulatory authority over the ADEA. *See* Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 7, 81 Stat. 602 (1967). As of July 1, 1979, however, these ADEA functions were transferred to the EEOC as part of President Carter's reorganization plan to consolidate the federal government's employment enforcement efforts. *See* Reorganization Plan No. 1 of 1978, *reprinted in* 1978 U.S.C.C.A.N. 9799. The Reorganization Plan was later was codified at 5 U.S.C. § 906.

sixty days after he has filed a "charge" with the EEOC alleging discriminatory conduct, thereby permitting voluntary conciliation.

When a claimant files a "charge," the EEOC is given the opportunity to investigate the charge, notify the employer, and work to resolve the claims through informal conciliation. Even if the EEOC is unable to resolve the charge without investigation, the EEOC's issuance of a probable cause determination educates the parties as to the strength of their respective positions. "A party is far more likely to settle when he has enough information to be able to assess the strengths and weaknesses of his opponent's case, as well as his own." *EEOC v. Assoc. Dry Goods Corp.*, 449 U.S. 590, 601 (1981). Upon learning of a claim's strengths or weaknesses, the parties may decide that conciliation, rather than litigation, is the better course.

The EEOC's statistics demonstrate that, given the opportunity, many charges can be successfully settled and conciliated at the administrative level. The following table provides the number and percentage (of total charges resolved) of charges concluded at the administrative level in 2006 through settlement, conciliation or withdrawal. The table provides statistics for charges filed under the ADEA, and under all statutes enforced by EEOC.

	ADEA[4]	All Statutes[5]
Settlements (Negotiated)	1,417	8,500
	10.0%	11.4%
Successful Conciliation	177	1,141
	1.3%	1.5%
Withdrawal of charge upon receipt of desired benefits	767	4,052
	5.4%	5.5%
TOTAL	2,361	13,693
	16.7%	18.4%

By resolving a significant number of claims at the administrative level, the EEOC prevents costly and time-consuming litigation that burdens the parties and the courts.

Second, the Second Circuit held that Kennedy could proceed with suit without the EEOC ever notifying the employer of the dispute. Prompt notice of alleged

[4] *See* EEOC, *Charge Statistics – ADEA*, http://www.eeoc.gov/stats/adea.html.

[5] *See* EEOC, *Charge Statistics – All Statutes*, http://www.eeoc.gov/stats/all.html.

discriminatory acts is important because it gives employers the opportunity to detect and correct potentially discriminatory practices in a timely and efficient manner. It also provides the employer with an independent opportunity to settle the grievance without litigation.

Notice is particularly important, where, as here, the employer is faced with a class action discrimination lawsuit. The Second Circuit allowed eleven of the plaintiffs below to litigate their claims under the auspices of the "single filing rule." The single filing rule permits class members to forego the requirement of individually filing charges so long as one plaintiff has complied with Section 7(d) of the ADEA and the charge makes class allegations. "The rationale for th[e single filing] rule is to avoid needless repetition in the filing of administrative charges when the initial claim was sufficient to put the employer on notice of the alleged violations and afford the employer an opportunity for conciliation with the aggrieved employees." *Holowecki v. Fed. Express Corp.*, No. 02 Civ. 3355, 2002 WL 31260266, at *3 (S.D.N.Y. Oct. 9, 2002) (citing *Levy v. U.S. Gen. Accounting Office*, No. 97 Civ. 4016, 97 Civ. 4488, 1998 WL 193191, at * 2 (S.D.N.Y. Apr. 22, 1998)).

The Second Circuit allowed Kennedy and those piggybacking on her claim to proceed with suit even though *none* of the plaintiffs below filed a charge alleging class discrimination that complied with Section 7(d) of the ADEA prior to filing suit. Because no charge with class allegations was filed until after litigation was commenced, the EEOC did not notify the employer, Federal Express Corporation ("FedEx"), that one claim, let alone multiple claims, of discrimination was pending against it. Had FedEx received notice of the charge, it could have attempted conciliation

and settlement with the affected class of employees, and possibly avoided costly and cumbersome litigation.

If an employer is unable to conciliate or settle a discrimination claim, the ADEA's notice requirement serves to prevent an employer from having to defend against employment decisions that are long past. As recently noted by this Court in *Ledbetter v. Goodyear Tire & Rubber Co.*, suits based on remote employment actions are disfavored because "the passage of time may seriously diminish the ability of the parties and the factfinder to reconstruct what actually happened." 127 S. Ct. 2162, 2171 (2007).[6] The *Ledbetter* case illustrated the problems created by tardy lawsuits where the plaintiff's claims turned principally on the misconduct of a single supervisor who allegedly retaliated against the plaintiff when she rejected his sexual advances during the 1980's. *Id.* at 2171 n.4. By the time of trial, this supervisor had died and, therefore, could not testify. This Court found that "a timely charge might have permitted his evidence to be weighed contemporaneously." *Id.*

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[6] Prior to *Ledbetter*, this Court showed a similar disdain for stale claims in *National Railroad Passenger Corp. v. Morgan*:

> Allowing suits based on such remote actions raises all of the problems that statutes of limitations and other similar time limitations are designed to address. Statutes of limitation promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

536 U.S. 101, 125 (2002) (internal quotations omitted).

In the context of ADEA actions, a standard that allows a claimant to file suit without notice to the employer places employers at risk of learning about the grievance well in excess of the congressionally prescribed statute of limitations. The ADEA provides that, to be timely, a charge shall be filed within 180 days after the alleged unlawful practice occurred, except in states with their own age discrimination laws and remedial agencies, where the time is extended to 300 days. 29 U.S.C. §§ 626(d), 633(b). Under the Second Circuit's logic, an intake questionnaire filed within the limitations period constitutes a timely "charge" that would preserve the claimant's right to subsequently file suit, even though the EEOC did not notify the employer as it would with a charge.

The consequence of the general application of such a rule would be for employers to receive notice of an employment grievance—as happened in this case—only when the claimant files suit against the employer. An ADEA claimant could wait years to bring a discrimination lawsuit in the absence of the EEOC acting on the claimant's filed questionnaire.[7] This failure to receive notice would significantly impede the employer's ability to adequately prepare for litigation in that it could not preserve "a record of" evidence contemporaneous with the alleged discrimination, document the testimony of key witnesses, or hire legal counsel to prepare its defense or to negotiate settlement.

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[7] Title VII, 42 U.S.C. 2000e-5(f)(1), and Title I of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12117(a), each require the claimant receive a right to sue notice from the EEOC before bringing suit. Because receipt of a right to sue notice is not a condition precedent to bringing suit under the ADEA, the only limitation on a claimant's ability to file a lawsuit would be if the EEOC issued a notice of right to sue. A claimant would have to bring suit within ninety days if a notice of right to sue is received. 29 U.S.C. § 626(e).

The negative repercussions of employers failing to receive timely notice of allegations of discrimination go beyond effects on the employer. If an employer is unaware of a pending discrimination claim, it is unable to disclose that information to other businesses, which severely impacts the quality of due diligence. Shareholders and other businesses are placed in jeopardy of detrimentally relying upon audit reports or disclosures made by the business that, through no fault its own, inaccurately reflect its financial standing where unknown claims against it are not timely reported.

The EEOC's duties of conciliation and notice are an important part of its overall mission to eradicate employment discrimination. To hold otherwise would read out the mandatory requirements under the statute, and render the EEOC a meaningless weigh station or ticket taker—devoid of function or purpose on the road to the courthouse.

B. The Second Circuit's Decision Should Be Reversed Because It Misinterprets The EEOC's Regulations And Misunderstands EEOC Procedure

As the federal agency charged with investigating claims of employment discrimination under the ADEA and settling disputes arising thereunder, it is within the EEOC's province to establish procedures that allow it to efficiently process filed charges. The regulations governing the agency's procedures provide that only "[u]pon receipt of a *charge*" will the EEOC notify the prospective defendants and initiate conciliation efforts pursuant to the ADEA. 29 C.F.R. §§ 1626.11, 1626.12 (emphasis added).

The EEOC's regulations and the printed language on the intake questionnaire forms demonstrate that the EEOC does not intend a questionnaire to function as a "charge." *Id.*; *Diez v. Minn. Mining & Manuf. Co.*, 88 F.3d 672, 676 (8th Cir. 1996). The regulations make clear that, while a charge is "sufficient" if it names the respondent and generally alleges the discriminatory action, not all documents containing similar information are charges. *Steffen v. Meridian Life Ins. Co.*, 859 F.2d 534, 542 (7th Cir. 1988). The regulations distinguish between a "charge" and a "complaint," the latter defined as "information received from any source, that is not a charge, which alleges that a named prospective defendant has" violated one of the statutes administered by the Commission. 29 C.F.R. § 1626.3 (emphasis added); *see also Early v. Bakers Life & Cas. Co.*, 959 F.2d 75, 79 (7th Cir. 1992).

Thus, the only plausible reason why the EEOC would distinguish a "charge" from other types of information communicated to the EEOC is that a "charge" is submitted under circumstances that would lead the EEOC to activate the ADEA's administrative review process. *Steffen*, 859 F.2d at 542. Moreover, there could be no other explanation as to why the EEOC labels certain forms as "Intake Questionnaires" and other forms as "Charges of Discrimination." *Diez*, 88 F.3d at 676.

By expanding the term "charge" to include intake questionnaires and other pre-charge documents, the Second Circuit's opinion eliminates the clear standard set forth by the EEOC's regulations as to when the agency's statutory obligations are invoked. If the EEOC does not understand a claimant's filing of an intake questionnaire to be a charge, it does not make any effort to notify the employer or conciliate the claim—duties that Congress has instructed the agency to undertake.

C. The Second Circuit's Decision Should Be Reversed Because It Is Not Supported By Existing Case Law

Courts have recognized two situations in which an intake questionnaire may function as a charge. The first approach, which the Seventh Circuit has dubbed "substantial compliance," finds that when a completed intake questionnaire satisfies the requirements for a charge and the circumstances demonstrate that the EEOC acted on the intake questionnaire, the questionnaire may serve as the claimant's filed charge. *Early*, 959 F.2d at 79. This approach finds that if the EEOC triggers its statutory obligations upon the receipt of an intake questionnaire, "it is hard to see what more to ask of the employee." *Id.* at 80; *see also Bost v. Fed. Express Corp.*, 372 F.3d 1233, 1235 (11th Cir.) (finding, on facts almost identical to those of *Holowecki*, that plaintiffs' claims were time-barred because case lacked exceptional circumstances, such as the EEOC acting on the intake questionnaire, to find that the questionnaire could suffice as a charge), *cert. denied*, 543 U.S. 1020 (2004); *Clark v. Coats & Clark, Inc.*, 865 F.2d 166 (3d Cir. 1982) (finding intake questionnaire fulfilled all of the ADEA's statutory objectives desired by Congress where employers received notification); *cf. Price v. Sw. Bell Tel. Co.*, 687 F.2d 74, 78-79 (5th Cir. 1982) (precluding summary judgment in Title VII case where EEOC, upon receipt of complaint, initiated the administrative process).

Alternatively, courts have found that misleading conduct by the EEOC can be a basis for tolling the administrative statute of limitations. *Early*, 959 F.2d at 81. *Compare Steffen*, 859 F.2d at 543 (holding that where the EEOC informed claimant that it would be treating the intake questionnaire as

a charge, but did not do so, claimant's action would not be barred), *with Diez*, 88 F.3d at 677 (finding intake questionnaire could not function as a charge because no evidence that state agency misled claimant).

The Second Circuit relied on inapposite authority to conclude that the an intake questionnaire could suffice as a charge, absent circumstances that the EEOC acted on the questionnaire. In particular, the Second Circuit relied on *Hodge v. New York College of Podiatric Medicine*, 157 F.3d 164 (2d Cir. 1998) for the proposition that Kennedy could proceed with suit without first exhausting administrative remedies. The Second Circuit stated that "it is not required that the EEOC has actually taken action before an individual who otherwise satisfactorily filed a charge, can bring suit in federal court." *Holowecki v. Fed. Express Corp.*, 440 F.3d 558, 562 (2d Cir. 2006). However, *Hodge* is not a case that held that intake questionnaires can function as charges.

In *Hodge*, a professor alleged that the New York College of Podiatric Medicine (the "College"), his employer, violated the ADEA by refusing to extend his two-year teaching contract as required by a faculty manual. 157 F.3d at 165. Prior to his termination, the professor filed a charge of age discrimination with the EEOC. *Id.* at 166. The professor thereafter entered into a settlement agreement with the College whereby the College agreed to employ him for one final year. *Id.* In turn, the professor agreed to release the College from liability under the ADEA, and withdraw his EEOC charge. *Id.* Shortly after completing his final year of employment, the professor filed an ADEA lawsuit. *Id.*

The district court dismissed the suit on the basis that the professor's action was time-barred because the lawsuit was

brought more than ninety days after termination of the EEOC charge. *Id.* at 167. The Second Circuit reversed, finding that the release agreement signed by the professor withdrawing his EEOC charge was invalid under the Older Workers Benefit Protection Act. *Id.* The invalid release prevented dismissal of the professor's ADEA action because withdrawal of the claim under the release could not trigger the ninety-day period for bringing an ADEA action, the Second Circuit held, so as to preclude future suit once that period expired. *Id.* To find otherwise would cause the professor and others in his circumstances to lose their ADEA rights within ninety days of signing an invalid release agreement. *Id.*

The Second Circuit's holding in *Hodge*, that a period of limitation did not accrue where the employee's withdrawal of the EEOC complaint was based on an invalid settlement agreement, had no bearing on the issue before the Second Circuit in *Holowecki*. That issue—whether an intake questionnaire could function as a charge sufficient to exhaust ADEA's administrative remedies—is not addressed by *Hodge*. Given that the plaintiff in *Hodge* filed a timely charge of discrimination with the EEOC prior to initiating his lawsuit, the Second Circuit's reliance on *Hodge* was misplaced.

The Second Circuit had no basis for finding that the intake questionnaire filed in the instant case could function as a charge given the standards set forth by its sister circuits. In the proceeding below, there was no evidence that the EEOC began investigating the claim, offered to conciliate the claim, notified the employer, or misled Respondent Patricia Kennedy. Therefore, the Second Circuit's decision should be reversed where it was not supported by the relevant case law.

II. THE SECOND CIRCUIT'S FINDING THAT AN INTAKE QUESTIONNAIRE MAY ROUTINELY FUNCTION AS A CHARGE SHOULD BE REVERSED BECAUSE IT DEPRIVES EMPLOYERS OF THE BENEFIT OF THE EEOC'S VETTING PROCESS FOR DISCRIMINATION CLAIMS

The Second Circuit's finding that an intake questionnaire may serve as a charge, regardless of any other circumstances surrounding a claimant's failure to timely file a formal charge, is tantamount to a finding that every completed questionnaire functions as a charge. The practical implications of such a rule would be to subject employers to discrimination claims that have not been properly vetted by the EEOC. In addition, a finding that every intake questionnaire is the equivalent of a charge harms employers because it will increase the EEOC's workload to a point that the agency cannot efficiently process claims and, in turn, fulfill its statutory obligations.

A. Finding That An Intake Questionnaire Should Function As A Charge Forces Employers To Respond To Charges That Have Not Been Vetted By The EEOC

The Second Circuit's decision eviscerates the EEOC's current procedure for vetting claims of discrimination. Central to the EEOC's mission of eradicating employment discrimination is the development and implementation of charge-resolution programs and processes. *See* Dr. E. Patrick McDermott, *An Evaluation of the EEOC Mediation Program* (Sept. 20, 2000), *available at* http://www.eeoc.gov/mediate/report/index.html. To determine which claims deserve further investigation and employer notification, the EEOC has adopted a two-step filing procedure embodied in a pair of

forms: the Intake Questionnaire (Form 283) and the Charge of Discrimination (Form 5).

These two documents differ in both form and function. The Intake Questionnaire solicits preliminary information, while filing a Charge of Discrimination formally engages EEOC's administrative machinery. In a typical claimant's situation, on the first visit to an EEOC office, the individual completes an intake questionnaire that requests the claimant's name and address, the reason for the alleged discriminatory action, a brief description of the action complained of, and the name, address, and size of the employer. On the basis of this submission, an EEOC official determines whether grounds exist for filing a charge.

The Second Circuit's finding that an intake questionnaire can function as a charge strips the EEOC of the initial layer by which it vets discrimination claims. This approach would force employers to respond to frivolous claims of discrimination where all claims—whether submitted on an intake questionnaire or charge form—would invoke the statutory machinery and be forwarded to the employer for response.

B. Finding That Every Intake Questionnaire Is A Charge Harms Employers Where It Increases The EEOC's Workload Such That The Agency Cannot Efficiently Process Claims Or Fulfill Its Statutory Obligations

The EEOC currently employs a charge-prioritization system to further weed out frivolous discrimination claims. The system provides classification of charges into three

categories, simply named Category A, B, and C.[8] *See* EEOC: New Charge-Processing System Means More Action at Local Level, Official Says, 92 Daily Lab. Rep. (BNA) D-9 (May 12, 1995). This charge prioritizing process acts as a "triage" procedure that allows the EEOC to classify cases depending on merit and importance, and to close out many charges after brief investigations. Michael Z. Green, *Proposing a New Paradigm for EEOC Enforcement After 35 Years: Outsourcing Charge Processing By Mandatory Mediation*, 105 Dick. L. Rev. 305, 310 (2001). Category A charges receive priority because these cases contain reasonable cause to believe that a violation occurred. Category B is investigated as agency resources permit, and the EEOC immediately dismisses charges in Category C.

A rule that intake questionnaires should be processed as charges would flood the EEOC with discrimination claims to be recorded, processed, and "triaged." Such a rule would overburden an agency that is already under considerable strain. A burgeoning workload, accompanied by a shortage of staff, has created a backlog in the processing of filed charges. Congress recently recognized the challenges facing the agency when it approved a $4 million increase over the EEOC's fiscal year 2007 budget. Chairman Allan B. Mollahan said in a committee report on the House appropriation bill that the increased funding for EEOC was needed to reduce the backlog of discrimination charges that

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[8] Category A charges receive priority because they are "more likely than not" to demonstrate discrimination has occurred; Category B charges are held until the EEOC receives further evidence as to whether it is more likely than not that a violation has occurred; and Category C charges are subject to immediate dismissal. *See* EEOC: New Charge-Processing System Means More Action at Local Level, Official Says, 92 Daily Lab. Rep. (BNA) D-9 (May 12, 1995).

the Commission estimates will grow to more than 67,000 in fiscal 2008. H.R. Rep. No. 110-240, at 131 (2007).

Adding to the EEOC's workload the responsibility of processing and investigating intake questionnaires can only cause the current backlog to increase. A backlog requires substantial resources just to maintain the *status quo* and subjects both claimants and employers to longer delays in handling cases. The inevitable result would be less effective enforcement of the ADEA.

III. THE SECOND CIRCUIT'S INTERPRETATION PERMITTING INTAKE QUESTIONNAIRES TO SUBSTITUTE FOR CHARGES IS INCORRECT BECAUSE IT WOULD PLACE THE EEOC IN THE POSITION OF HAVING CONFLICTING OBLIGATIONS UNDER THE PRIVACY ACT AND THE ADEA

The Privacy Act establishes strict controls over what personal information is collected by the federal government and how it is used. *See* 5 U.S.C. § 552a. Intake questionnaires and charges both qualify as records governed by the Privacy Act. *See* 29 C.F.R. § 1611.10 (stating that "the Commission shall not disclose any record which is contained in a system of records it maintains[.]"). But only the charge form is subject to an exception from the prohibition on disclosure under the Privacy Act where it provides on the form that the information within the charge form may be disclosed to the employer. *See* 5 U.S.C. 552a(b) (providing for disclosure based on consent of person giving information).

The EEOC is prohibited from disclosing the information contained within an intake questionnaire unless the claimant

consents to the disclosure in writing. For example, if a person submits an intake questionnaire to the EEOC, that record is covered by the Privacy Act. If the EEOC receives an intake questionnaire, and prior written consent has not been given for the EEOC to disclose the record to the employer, the EEOC is prohibited from disclosing the record. This is the case even if the EEOC treats the intake questionnaire as a charge, thus triggering its obligations to provide notice to the employer under the ADEA.

The Second Circuit's decision to allow intake questionnaires to substitute for charges places the EEOC in what amounts to a legal "Catch-22" because the agency cannot satisfy its statutory duty to provide notice to employers without violating the provisions of the Privacy Act.

CONCLUSION

For the foregoing reasons, the Court should reverse the Second Circuit's decision below.

Respectfully submitted,

LAWRENCE Z. LORBER
Counsel of Record
STEPHANIE L. MARN
MEREDITH C. BAILEY
JAMES F. SEGROVES
PROSKAUER ROSE LLP
1001 Pennsylvania Ave., NW
Suite 400 South
Washington, DC 20004
(202) 416-6800

ROBIN S. CONRAD
SHANE BRENNAN
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Counsel for Amicus Curiae